Supreme Court, U.S.
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No. 94-2124

In The

Supreme Court of the United States

October Term, 1995

LARRY MILTON,

Petitioner,

v.

THOMAS HELLER, Individually and in his official capacity as Police Officer,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE DENIAL OF FEES WAS PROPER AND WARRANTED UNDER *FARRAR V. HOBBY* WHERE A CIVIL RIGHTS PLAINTIFF SEEKING COMPENSATORY DAMAGES UNDER 42 U.S.C. § 1983 WAS AWARDED ONLY NOMINAL DAMAGES AGAINST ONE OF FIVE DEFENDANTS?

II. WHETHER THE COURT PROPERLY DENIED AN AWARD OF COSTS TO THE PLAINTIFF WHERE HE RECOVERED ONLY NOMINAL DAMAGES AGAINST ONE OF FIVE DEFENDANTS?

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BRIEF IN OPPOSITION

Respondent THOMAS HELLER respectfully opposes the Petition for Writ of Certiorari to review the order denying the Petition for rehearing and suggestion for rehearing en banc entered by the United States Court of Appeals for the Eighth Circuit on March 27, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which the Petitioner seeks to review, is reported at 47 F.3d 944 and is contained in Petitioner's

Appendix A. The Ruling of the United States District Court for the Southern District of Iowa Denying Application for Attorney Fees and Costs is unreported and is contained in Petitioner's Appendix B. The Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc is contained in Petitioner's Appendix C.

JURISDICTION

Jurisdiction in the United States District Court below was premised on 28 U.S.C. §1343(3) based on 42 U.S.C. §1983 and §1988. The jurisdiction of the Eighth Circuit Court of Appeals was based upon 28 U.S.C. §1291. The Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). Certiorari is unwarranted in this matter because the decision of the Eighth Circuit Court of Appeals is directly in accord with this Court's decision in *Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). The circuit courts of appeal are in accord on the issue of denial of attorney fees in nominal damage cases under similar circumstances.

STATUTORY PROVISIONS

The text of 42 U.S.C. Section 1988(b) 1994 is included in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On the evening of December 28, 1991, Larry Milton was arrested for intoxication. When he refused handcuffing, an altercation occurred. Two starkly different versions of what happened next were presented. Milton claimed that he was struck repeatedly with a flashlight without provocation by three police officers, Sergeant Pollock, Officer Heller and Officer Strawser, and that Sergeant Pollock had used racial epithets and threatened Milton. The officers testified that Milton was intoxicated and high on drugs, that he resisted handcuffing, and that he fought and grabbed one officer's gun. The officers admitted that Milton was then struck in the head with a flashlight by Officer Heller.

On April 3, 1992, Larry Milton filed a Complaint naming as Defendants the City of Des Moines, Iowa, and three police officers, Sergeant Joanne Pollock, Thomas Heller and Stephen Strawser. Plaintiff brought the following damage claims: (1) Under 42 U.S.C. §1983 against the officers for use of excessive force in violation of Plaintiff's constitutional rights; (2) Under 42 U.S.C. §1983 against the City of Des Moines for maintaining a pattern and practice of allowing police officers to use flashlights as weapons, and failing to properly train and supervise officers by allowing them to use flashlights as weapons; (3) For negligence per se against the officers and City of Des Moines for alleged violations of Des Moines Police Department Regulations, by using unnecessary force and by using an "unauthorized" auxiliary weapon, namely, a flashlight; and (4) For assault and battery, directly against the officers, and against the City of Des Moines for statutory liability as employer of the officers. In addition,

Plaintiff joined in the same lawsuit a claim against Broadlawns Medical Center for allegedly violating Plaintiff's rights by disclosing the results of drug and alcohol tests performed on Milton following the incident. Plaintiff dismissed his lawsuit against Defendant Broadlawns Medical Center in 1992.

Plaintiff initially sought both compensatory and punitive damages against the police officers. He sought compensatory damages from the City of Des Moines.

The Defendant City and police officers were granted summary judgment on the negligence claims in September of 1993. On December 1, 1993, eight days prior to trial, punitive damage claims against the police officers were dismissed by plaintiff. The claims against the City were bifurcated and later dismissed.

The case proceeded to trial beginning December 9, 1993 before a jury on the claims of excessive force and battery against the three police officers. Following trial, a jury returned a verdict in favor of Defendants Sergeant Pollock and Officer Strawser, and a verdict for $1.00 in nominal damages against Defendant Officer Heller, under the state law claim of battery and excessive force under 42 U.S.C. §1983.

Plaintiff filed an application for attorney fees and costs on December 30, 1993. Defendant Heller resisted this application. The district court denied the Plaintiff's application for attorney fees and costs.

The Plaintiff appealed the denial of attorney fees and costs to the Eighth Circuit Court of Appeals. The Court of Appeals affirmed the District Court's ruling, finding no

abuse of discretion. The Plaintiff's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 27, 1995.

REASONS FOR DENYING THE PETITION

I. WHETHER THE DENIAL OF FEES WAS PROPER AND WARRANTED UNDER *FARRAR V. HOBBY* WHERE A CIVIL RIGHTS PLAINTIFF SEEKING COMPENSATORY DAMAGES UNDER 42 U.S.C. §1983 WAS AWARDED ONLY NOMINAL DAMAGES AGAINST ONE OF FIVE DEFENDANTS?

In its ruling denying the Petitioner's application for attorney's fees and costs, the District Court noted that "by *Farrar* standards this is the usual nominal damage case", and thus plaintiff was entitled to no fee. The District Court was referring to this Court's ruling in *Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), where this Court held that "When a plaintiff 'recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, . . . the only reasonable fee is usually no fee at all.' "

In *Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), this Court decided that a plaintiff who is awarded nominal damages is a "prevailing party" under 42 U.S.C. §1988, but also stated that "the 'technical' nature of a nominal damages award bear[s] on the propriety of fees awarded under §1988." 113 S.Ct. at 574. This Court reaffirmed in *Farrar* that " . . . 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.' " *Id.* at 574.

This Court went on to address the entitlement to fees of a plaintiff seeking compensatory damages for violation of his civil rights:

> [I]n some circumstances, even a plaintiff who formally 'prevails' under §1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. . . . In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury. (citation omitted) Whatever the constitutional basis for substantive liability, damages awarded in a §1983 action 'must always be designed "to **compensate injuries** caused by the [constitutional deprivation." ' (citation omitted) (emphasis in original) **When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable fee is usually no fee at all.** (Emphasis added)

Id. at 575.

The District Court was following this mandate when it analyzed the quality and quantity of the relief obtained by the plaintiff and found that the plaintiff's success was "marginal." The Court observed that there were no novel legal issues or complicated factual circumstances. The District Court considered the factors set forth in Justice O'Connor's concurring opinion in *Farrar*, exercised his discretion and denied the application for attorney's fees.

Such a determination properly remains within the discretion of the district court. "This allocation of decisionmaking makes sense. The district court is in the best position to ascribe a reasonable value to the lawyering it has witnessed and the results that the lawyering has achieved." *Wilcox v. City of Reno*, 42 F.3d 550, 555 (9th Cir. 1994).

This allocation of decisionmaking was clear in the legislative history of 42 U.S.C. §1988, which provides that "the Court, *in its discretion*, may allow the prevailing party . . . a reasonable attorney's fee. . . . " House Report 8 provides in part as follows:

> [A] key feature of the bill is its mandate that fees are only to be allowed *in the discretion* of the court. Congress has passed many statutes *requiring* that fees be awarded to a prevailing party. Again, the Committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions.

H.R. Rep. 94-1558 (1976)

The district court noted that nothing in this case distinguishes it in any meaningful way from *Farrar* for purposes of determining attorney's fees. Despite the newspaper editorials and extensive media coverage surrounding this case, this lawsuit did not result in a finding of any unconstitutional policy nor did it actually spark any change of policy or legislation. *Cf. Wilcox v. City of Reno*, 42 F.3d 550, 556-557 (9th Cir. 1994), *Koopman v. Water District No. 1 of Johnson County, Kansas*, 41 F.3d 1417, 1421 (10th Cir. 1994). It may be interesting to note

that the newspaper articles cited by the Plaintiff are prior to or during trial of this matter.

No punitive damages were awarded in this case. *Cf. Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994).

Although the case began with newspaper headlines and enlarged photographs screaming of plaintiff's allegations of police brutality, it ended with nothing more than a verdict of $1.00 against one of several defendants. As such, it is the usual nominal damage case.

Petitioner argues that he did not seek an enormous sum of money, that the "vindication of his constitutional rights" was his most important goal, and was achieved. This argument is totally without merit.

Plaintiff offered into evidence approximately $6,000 in medical bills. He displayed his injuries to the jury and offered into evidence numerous photographs illustrating his condition following the incident. He testified as to continued pain and suffering. Plaintiff did not ask the jury to award nominal damages of $1.00 – Plaintiff sought compensatory damages.

Petitioner's counsel's attempt to justify his entitlement to fees by claiming that he was not seeking a large amount of money does not change the mandate of *Farrar*. *See Romberg v. Nichols*, 48 F.3d 453, 455 (9th Cir. 1995). The Eighth Circuit properly affirmed the denial of attorney's fees under these circumstances. Other United States Courts of Appeals which have considered whether an award of attorney's fees is warranted in a nominal damage case interpret *Farrar* uniformly. When a plaintiff seeks compensatory damages for a violation of his or her civil

rights and receives only nominal damages, the only reasonable fee is no fee at all. *See Carter v. Burch*, 34 F. 3d 257 (4th Cir. 1994), *Cramblit v. Fikse*, 33 F. 3d 633 (6th Cir. 1994), *Cartwright v. Stamper*, 7 F.3d 106 (7th Cir. 1993), *Willis v. City of Chicago*, 999 F.2d 284 (7th Cir. 1993), *Romberg v. Nichols*, 48 F.3d 453, 455 (9th Cir. 1995).

The courts of appeal also seem to agree that when the verdict serves as an impetus to a change in policy an award of attorneys fees may be warranted. *See Wilcox v. City of Reno*, 42 F.3d 550, 556-577 (9th Cir. 1994), *Koopman v. Water District No. 1 of Johnson County, Kansas*, 41 F.3d 1417, 1421 (10th Cir. 1994). Likewise, when punitive damages are awarded in addition to the nominal damage award, some amount of attorney's fees may be justified. *See Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994).

As stated above, this case did not involve any change in policy or a punitive damage award. In this action the claims relating to allegations of unconstitutional City policies were bifurcated and later dismissed. The punitive damage claims were dismissed prior to trial. In sum, there is no meaningful distinction between this case and *Farrar v. Hobby*. The courts below correctly determined that the only reasonable fee in this matter is no fee at all.

II. WHETHER THE COURT PROPERLY DENIED AN AWARD OF COSTS TO THE PLAINTIFF WHERE HE RECOVERED ONLY NOMINAL DAMAGES AGAINST ONE OF FIVE DEFENDANTS?

Generally, costs are allowed to a prevailing party, unless the court otherwise directs. Rule 54(d) Federal

Rules of Civil Procedure. The court is vested with discretion under Rule 54(d). Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d §2668. The court may grant, deny or apportion costs in the exercise of its discretion. *Id.*

In her concurring opinion in *Farrar*, Justice O'Connor suggests that since fees awarded under 42 U.S.C. §1988 are only awarded as a part of costs, they should be denied under the same circumstances: "Just as a pyrrhic victor would be denied costs under Rule 54(d), so too should it be denied fees under §1988". *Farrar*, ___ U.S. ___, 113 S.Ct. 566, 578, 121 L.Ed.2d 494 (1992).

The District Court considered the same factors in determining assessment of court costs that he did concerning attorney's fees. In addition, he noted that three other defendants were prevailing parties against the plaintiff, and that if costs were assessed against defendant Heller they would also be assessed, as to the other defendants, against the plaintiff. He concluded that in fairness all parties should bear their own costs and expenses. The denial of costs was an appropriate exercise of discretion by the Court.

CONCLUSION

Based on the above stated facts, law and reasoning, the Respondent respectfully requests that this Court deny the Plaintiff's Petition for Writ of Certiorari and assess costs to the Plaintiff.

Respectfully submitted,

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